

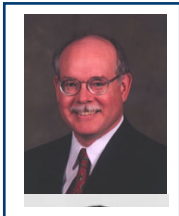
## PROPERTY INSURANCE

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### IN THIS ISSUE

Dennis J. Wall reports on an interesting development involving property insurance companies. In an increasing number of cases, courts are carving out areas of good faith and fair dealing standards of liability for actionable claims after the policyholder files a complaint against the property insurance company.

### Bad Faith After the Complaint? Courts Carve Out Actionable Cases Against Property Insurers



#### ABOUT THE AUTHOR

Dennis J. Wall has gathered 30 years of expertise and knowledge in Insurance Coverage and Bad Faith that have led many attorneys, businesses, and government bodies to retain him as an Expert Witness, Counsel, and Mediator in large and complicated Insurance Coverage disputes of all types across the United States.

Dennis Wall is the author of the leading book on Bad Faith, "Litigation and Prevention of Insurer Bad Faith" (now in its Second Edition published by Shepard's/McGraw-Hill; 2008 Supplement published by West Publishing Company) analyzing over 3,600 cases, statutes, regulations, and other legal authorities. He is also the Co-Author of "Catastrophe Claims," which addresses Catastrophe Claims and Insurance Coverage, published by Thomson West in the Fall of 2008.

#### ABOUT THE COMMITTEE

The Property Insurance Committee includes members who address a variety of issues involving first party insurance claims. The types of claims addressed include both pre-suit and litigated claims. The issues addressed include coverage, valuation, the use of the appraisal process, the handling of suspicious claims, first party bad faith, UM/UIM, life, health and disability, and other first party issues which arise during the claims handling process and as a result thereof. The Committee also deals with issues involving subrogation and recovery efforts made by insurers in connection with payments made by them. Through newsletters, programs and sharing information, Committee membership allows the members to better serve their clients and the insurance industry.

Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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A Property Insurer's conduct after a complaint is filed against it for Property Insurance Coverage or for alleged Bad Faith and Unfair Dealing, may be admissible in evidence depending on the circumstances and the conduct. Since such conduct is *admissible* in evidence in these cases, this sort of claims handling conduct after the complaint is filed is thus made *actionable* by the Courts holding this view. See generally Dennis J. Wall, *Litigation and Prevention of Insurer Bad Faith* § 9:6 (Second Edition Shepard's/McGraw-Hill; 2008 Supplement Thomson/West).

Florida exemplifies this hastening trend among the Courts. It has been held under Florida law that the "litigation conduct" of a Defendant Insurance Company was admissible, relevant evidence on a cause of action or claim of Bad Faith against it in the handling of various First-Party Automobile Insurance Claims including Personal Injury Protection benefits. The "litigation conduct" at issue in that case gives pause. It consisted of allegations filed by the Insurance Company in its Answer to the Complaint, in its Amended Answer to an Amended Complaint, and in its Response to Requests for Admissions "again denying coverage". *Home Insurance Co. v. Owens*, 573 So. 2d 343, 344 (Fla. 4th DCA 1990), *review denied*, 592 So. 2d 680 (Fla. 1991).

Factual situations present new opportunities for expanding or contracting this increasingly accepted judicial construct of "a continuing duty of Good Faith and Fair Dealing". The coming year of 2009 may present numerous new opportunities for Property Insurance Companies and their Counsel to confront this construct, particularly in the area of Catastrophe Claims following the expected passage of coming Hurricanes. No other Courts furnish a clearer example of this opportunity than those which have been presented with similar opportunities in the

recent past, such as in the Gulf Coast States, particularly Mississippi.

In Mississippi, the handling of Property Insurance after a complaint is filed claiming Insurance Coverage, let alone containing allegations of a violation or violations of duties of Good Faith and Fair Dealing, can expose the Defendant Property Insurance Company to extra contractual liability. "Long ago" the Mississippi Supreme Court announced this holding in its decision in a case that is not available on its web site as this newsletter is being written: *Gregory v. Continental Insurance Co.*, 575 So. 2d 534 (Miss. 1990).

The *Gregory* case involved a claim for damages that were claimed to be covered under a "hazard policy" of Property Insurance. The damages were allegedly caused by Hurricane Elena in 1985. *It is extremely significant to the outcome of this case that every Court in Mississippi in which this case was tried or reviewed on appeal, from the Trial Court to the Supreme Court of Mississippi, agreed that the Defendant Property Insurance Company in that case had not been proven to mishandle the Policyholders' Property Insurance Claim before the lawsuit was filed.*

However, the opinion of the Mississippi Supreme Court described a *different, potentially actionable* situation concerning the Property Insurance Company's alleged handling of the claim *after* the lawsuit was filed:

An insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment. Put more bluntly, if you owe a debt the duty to pay does not end when you are sued for nonpayment of it.

Id. at 541.



This holding has given rise to many subsequent claims in Mississippi in the following years of alleged failures of Good Faith and Fair Dealing following the filing of complaints for Insurance Coverage and for Bad Faith damages, against Insurance Companies. The times we live in now of course play themselves out after the experiences left behind by Hurricane Katrina and Hurricane Rita and their resulting Insurance Claims, among other Catastrophes and Catastrophe Claims. In this context, a Federal Court in Mississippi recently held that this holding can have a profound effect on discovery in such cases, properly presented: *Odom v. Armed Forces Insurance*, 2006 WL 2541599 \*3 (S.D. Miss. Aug. 31, 2006). The Federal District Judge held in that case that the Plaintiffs-Policyholders "are entitled to take discovery concerning the handling of their claim, both before and after the filing of the complaint." [Emphasis added.] An Order of Dismissal was entered in this case on December 21, 2006, according to the Court's online docket, following

the parties' announced settlement of all claims. The Federal Court's holding is still a cause for reflection on the implications of a holding that post-complaint claims handling by Property Insurance Companies can be actionable in at least some circumstances in an enhanced number of jurisdictions. *See*, in addition to the authorities already analyzed above, *Federated Mutual Insurance Co. v. Anderson*, 297 Mont. 33, 41 ¶23, 43 ¶29 - 44 ¶31, 991 P.2d 915, 922 ¶¶23, 29 - 923 ¶31 (1999).

The lesson of these Courts and cases is clear: Property Insurance Companies do well not to suspend the handling of Property Insurance Claims in Good Faith nor Fair Dealing with their Policyholders after a complaint is filed, but instead do well to engage at all material times in demonstrable Good Faith and Fair Dealing concerning Insurance Claims under their Property Insurance Policies.



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